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IN THE

# Supreme Court of the United States

.....TERM, 1965

No. [redacted] 175

DANNY FRANK LUSTER and
EULA LEE WARNER,
Petitioners,
vs.
UNITED STATES OF AMERICA

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming their conviction of Violating Section 174, Title 21, U. S. C.

## OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix to this petition (1a).

## JURISDICTION

The Judgment of the Court of Appeals was entered on March 24, 1965. Order extending time to file Petition for Writ of Certiorari was granted by Justice Hugo L. Black on April 23, 1965, extending the time to and including May 23, 1965. The Jurisdiction of this Court is invoked pursuant to 28 U. S. C., Section 1254 (1)

## QUESTION PRESENTED

Was the forcible entry into the defendant, Danny Frank Luster's apartment illegal?

## STATUTES INVOLVED

Section 3109, Title 18, U. S. C.

> "The Officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or a person aiding him in the execution of a warrant."

28.880 Michigan Statutes Annotated:

> "To make an arrest, a private person, if the offense be a felony committed in his presence, or a peace officer with a warrant, or in cases of felony when authorized without a warrant, may break open an inner or outer door of any building in which the person to be arrested is, or is reasonably believed to be, if, after he has announced his purpose, he is refused admittance."

## STATEMENT OF FACTS

(Numbers in parentheses refer to pages of testimony taken at the hearing on the Motion to Suppress Evidence)

Having determined that they had probable cause to believe a felony was being committed at 2208 John R. Street, in the City of Detroit, Federal Narcotic Agent, in the company of two Detroit Police Officers, went to 2208 John R. Street without an arrest warrant, for the purpose of arresting the petitioners (P. 4 of testimony). Upon arriving at said address, the following conversation took place:

> Q. Who first approached the door?
>
> A. Myself, with Detective Ray Anderson, Detective with the Detroit Police Narcotic Bureau, with Agent Swank, and also Detective Karpinski of the Detroit Detective Bureau.
>
> Q. What next happened?
>
> A. Detective Anderson knocked on the door, then all activity stopped. Then I knocked on the door and advised that it was the Federal Narcotic Bureau, and then there was a muffled scream from within by a female voice—
>
> The Court (interposing): You mean that was after you knocked and announced that you were Federal Narcotic Agents?
>
> A. Yes, as soon as I announced "Federal Narcotic"—

Q. (Interposing): Did you ask that the door be opened up, or did you make any statement in connection with asking to be admitted?

A. Yes, sir, I advised to open the door, and there was no attempt whatever to open the door, and right after that muffled scream by a female inside, there was no activity at all to indicate that an attempt would be made to either answer the door or to open the door, at which time we forcibly entered the apartment.

Q. What next happened after you made this forcible entry?

A. We placed Luster, Danny Luster, also known as "Stinky" under arrest, and Eula Warner under arrest, and there was another female in the apartment. I don't recall her name. (Pages 10-11.)

After forcibly entering the apartment, Agent Swank seized a small amount of heroin from a table in the room in which the defendants were arrested. Agent Swank then went into the bedroom and took from a bureau drawer, a plastic medicine type bottle containing sixty-one (61) red capsules of heroin.

Counsel for the petitioners filed a pre-trial motion to suppress the evidence which was seized after the agent forcibly entered the apartment, claiming that the entry was illegal, and that the subsequent search was illegal, and that the evidence seized should be suppressed. The District Judge refused to grant the motion, and petitioners were tried and found guilty of violating Section 174, Title 21, U. S. C.

The United States Circuit Court of Appeals affirmed the Lower Court's decision, and Counsel now applies for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to test the ruling denying motion to suppress.

## REASONS FOR GRANTING THE WRIT

In this case there was a forcible entry into the home of the petitioner, Danny Frank Luster. The officers involved in making the arrest in this case never announced their purpose for demanding entry into petitioner's home. The Government and the petitioner agree that in instances where arrests for Federal offenses occur, and the arresting officers have no warrant of arrest, the lawfulness of the arrest is to be determined by reference to State Law, insofar as it is not in violation of the Federal Constitution.

"*Miller v. U. S.*, 357 U. S. 301;"

"*U. S. v. Di Re*, 332 U. S. 581."

Here the officers had no arrest warrant at the time they forcibly entered the petitioner, Danny Frank Luster's home, and therefore, the lawfulness of the subsequent arrest must be governed by Michigan Law, since the arrest occurred in Michigan.

The Michigan Statute applicable is Section 28.880, Michigan Statutes Annotated, which is as follows:

> "To make an arrest, a private person, if the offense be a felony committed in his presence, or a peace officer with a warrant, or in cases of felony when authorized without a warrant, may break open an inner or outer door of any building in which the person to be arrested is, or is reasonably believed to be, if, after he has announced his purpose, he is refused admittance."

A careful reading of the Statute indicates the manner of entry. If the officer is to enter legally, he must announce his purpose for demanding entry. This Statute is

very much like the Federal Statute which governs the conduct of a Federal officer in possession of a search warrant, who seeks to gain admittance to a home for the purpose of searching said home.

Federal Statute 18, U. S. C. Section 3109, states that an officer must give notice of his authority and purpose, if he is to legally gain entrance to a home. Primarily we are concerned here with only the Michigan Statute, since the officer did not have a search or arrest warrant at the time petitioners were arrested.

The requirement of prior notice should be strictly construed. The notice must be clearly given and in the instant case, notice of purpose should be given, because the Michigan Statute does not require notice of authority. In *"Miller v. U. S.,* 357 U. S. 301," a narcotics agent and a police officer went to arrest the defendant at his apartment in the early morning hours. They knocked on the door, and upon inquiry from within, "who's there", they replied in a low voice, "police". The defendant opened the door on an attached door chain, and asked what the officers were doing there; before either replied, defendant attempted to close the door. At this point, one officer put his hand inside the door, tore off the chain and entered. After the officers entered the apartment, they placed the defendant under arrest. On appeal from the Court of Appeals, the United States Supreme Court held that the officers' failure to expressly announce their purpose for demanding entry, was fatal. The Court noted that the burden of notice imposed by the Statute (Title 18 U.S.C. Section 3109) "is certainly slight" and a few more words by the officers would have satisfied the requirement. The Court further stated that even if the defendant had heard the word "police", the notice was considered insufficient because of their failure to indicate the purpose of seeking entry. Similarly, in the

case of *"Accarino v. U. S.,* 179 Fed. 2nd 456" where the police gave clear notice of their authority, but none of their purpose, the Court of Appeals held their announcement was insufficient, and the subsequent entry illegal. In "Accarino" the facts were these: The police called to the defendant from the bottom of a flight of stairs; "wait a minute, police." The defendant was at the top of the stairs to the second floor. Defendant proceeded to his apartment and closed his door. The police ran up the stairs, knocked on the door, and called out again, "Police", before they broke in. It is very plain to see from the reading of these two cases that unless there are exceptions to the rule, an officer must announce his purpose and authority for demanding entry to a home before he may legally break open doors in order to gain admittance.

From reading cases involving the two Statutes in question, those Statutes being Title 18, Section 3109, and Section 28.880 of the Michigan Statutes Annotated, it is suggested that there are two possible exceptions to the statutory requirement of express notice: (1) When an officer is "virtually certain" that the person to be arrested already knows the purpose of the officer in demanding entry, an announcement would be a useless gesture; and (2) when the circumstances are such that would justify non-compliance with the Statute. These circumstances are sometimes called "exigent circumstances". The Supreme Court in "Miller" recognized that an announcement would be a useless gesture, and need not be given, if the defendant knew the purpose of the officer's presence. It is to be noted, however, that before the announcement may be dispensed with, the facts known to the officer must justify the officer in being "virtually certain" that the defendant knows the officer's purpose. 357 U. S., pages 310-312. In the "Miller" case, the Government argued in the Court of Appeals

that the defendant's hasty attempt to close the door indicated he knew why the officers were there. The Court of Appeals, in a split decision, followed this reasoning. The majority opinion of the Court of Appeals reasoned that Miller, being a previous violator knew the workings of the police, and that he was alerted by his experience in his business, and by the events so recently transpiring and still in progress, is not to be doubted. The Court of Appeals further reasoned that without brief reference to the evidence, upon the sum total of what must have flashed through his mind, that he recognized the officers instantly as the Narcotics Squad, may be fairly inferred. The Court of Appeals stated that he knew that Shephard had brought in the money, and could have realized from his experience that it was marked. This exception follows the virtual certainty exception to the rule. The dissenting opinion written in the Court of Appeals by Chief Judge Edgerton did not agree that the officers had facts within their knowledge at the time that would justify them being "virtually certain" that the defendant knew of their purpose in being at his home. Judge Edgerton concluded that the officers did not make known their reason for demanding entry by merely identifying themselves as police. The case was appealed, and the United States Supreme Court reversed the Court of Appeals, by stating that the fact that Miller hastily retreated and attempted to close his door, did not indicate that he knew why the police were there. The Court held that "his act was an 'ambiguous Act', which could have been merely the expected reaction of any citizen having this experience at that hour of the morning." 357 U. S. 311. The Court held any inference which might be drawn from the defendant's act, falls short of a "virtual certainty." 357 U. S. pages 312-313.

The circumstances of virtual certainty have been strictly applied by the Court of Appeals for the District of Columbia. In *"Hair v. U. S.,* 289 Fed. 2nd 894," as the police approached within a short distance of Hair's home, a co-defendant began to step out of the front door. Upon seeing the police, he turned and ran up the stairs toward the second floor. The police gave chase, and without giving notice of authority or purpose, they threw open the front door and followed the suspect up the stairs. The Court of Appeals considered these circumstances as ambiguous as those in Miller, stating that the suspect's flight upon seeing police was not enough to meet the standard of virtual certainty. This position has been recently upheld by the Supreme Court in the case of *"Wong Sun v. U. S.,* 375 U. S. 471, 483." Keeping in mind the holdings of the Court in the Miller and Hair cases, it is hard to understand how the officers in the instant case can say that they were virtually certain that petitioners, Luster and Warner, knew the purpose of the officers being present and demanding entry to the petitioner's home. The Court is asked to interpret a muffled scream as giving the officers a reason to be virtually certain that the petitioners knew their purpose in demanding entry.

We now come to whether or not the circumstances were such as to justify non-compliance with the Michigan Statute in question. In the "Miller" case, the Supreme Court reserved answering the question "Whether the requirements of the rule admit of an exception justifying non-compliance in exigent circumstances." The Supreme Court did, however, observe in the Miller case that some State decisions have recognized such an exception. *"People v. Maddox,* 46 Calif. 2nd 301." Flight of the suspect or destruction of the evidence by him is a more common situation than the situation where the officer may be in danger of bodily

harm. Of course, if these facts, exigent circumstances, were to constitute justification for non-compliance, the entire Michigan Statute would be in danger of being engulfed by this exception, especially if the matter could turn on the officers good faith, belief that flight or destruction of evidence is imminent. The California case of Maddox clearly illustrates how such an opinion could totally destroy the logic in the Statute and render it of no consequence. In the California case, the California Court held that the police were justified in kicking in the defendant's door after they knocked and heard a voice say, "wait a minute" followed by the sound of retreating footsteps.

In the District of Columbia, it seems to be no danger that the Court will allow the requirements of the Statute to be so easily avoided. The reasoning of "Hair" expresses doubt whether an exception exists at all in the case of flight by the suspect. The Court of Appeals in that case stated "It may be doubted whether Miller is susceptible to such an exception." In *"Accarino v. U. S."* we declared that, "absent a warrant, intrusion into a man's dwelling for purpose of arrest can be justified only by necessities of the moment." We went on to state that, in any event, before an officer can break open a door to a home, he must make known the cause of his demand for entry. Necessitous circumstances may justify dispensing with a warrant issued upon a magistrate's determination of probable cause, but the proper announcement is required where entry is sought under a valid warrant. Surely, less is not to be demanded of an officer seeking entry without a warrant, 289 Fed. 2nd 897-9.

Even if flight constitutes exigent circumstances, the "Hair" case holds that a defendant's apparent flight into premises upon catching sight of the police is not within the

exception, because the defendant was not arrested or notified that the police wanted to arrest him.

In the instant case, the circumstances as described by the officer at the time of the forcible entry did not show the necessity for breaking open the door before announcing the purpose of their demand for entry.

A careful reading of the testimony taken at the time of the Motion to Suppress the evidence, clearly shows that the officer had plenty of time to make the proper announcement. It is also noted that the same officer was involved in the Sharpe case. In the Sharpe case, the officer stated that upon knocking at the defendant's door and announcing his authority, but before announcing his purpose, he heard some one inside say "quick, the back door", whereupon, he made a forcible entry. This is an experienced officer, at breaking open doors, and he knows what he should do before making a forcible entry. It appears that he is setting a pattern to see how far he can go without making the proper announcement of purpose.

If we are to be governed by the decision of the Sixth Circuit Court of Appeals in this case, it is plain to see that the Statute is of no consequence. The ruling in the Sixth Circuit, quoting from the Sharpe case, is "It is a reasonable conclusion that a declaration of purpose was implicit in the declaration of identity." If this is the rule, all the officer has to do is to announce his authority and never announce his purpose.

Assuming that the Sharpe decision is within the purview of the Michigan Statute, the Luster case can be distinguished to the extent that certainly a declaration of purpose would not be implicit in the declaration of identity. In the Sharpe case, the officer testified that immediately upon knocking at the door, he heard some one say, "quick,

the back door". No such testimony was given in the Luster case. In the instant case, the officer testified that he knocked upon the door, and nothing was said by anyone. He knocked again, and at this time he said "Federal Narcotic Bureau, Open the door." A muffled scream followed and all activity ceased, and when there was no indication from the inside that the occupants would either answer or open the door, the officers forcibly entered the premises. Certainly no exigent circumstances were here, because the officer testified that all activity ceased, which would indicate no activity at all, or any attempt to escape or destroy evidence. At this point, the officer should have completed the announcement of purpose. From the actions of the officer, the announcement of purpose would never have come, for he stated very plainly he was waiting for someone to open the door, and at this point, strictly construing the Michigan Statute, he was not entitled to be admitted, because he had not announced his purpose.

> "The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage, and should not be given grudging application." *Miller v. U. S.*, 357 U. S. 313.

## CONCLUSION

For the foregoing reasons we ask that the Writ of Certiorari be granted.

Respectfully submitted,

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# APPENDIX

## OPINION

No. 15945

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
v.
DANNY FRANK LUSTER and
EULA LEE WARNER,
*Defendants-Appellants.*

On appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided March 24, 1965

Before WEICK, Chief Judge, CECIL and O'SULLIVAN, Circuit Judges.

CECIL, Circuit Judge. Danny Frank Luster and Eula Lee Warner, defendants-appellants herein, appeal from an order of the United States District Court for the Eastern District of Michigan, Southern Division, adjudging them guilty of count one of an indictment charging them with possession of approximately 2.1 grams of heroin in violation of Section 174, Title 21, U.S.C.

Prior to trial, counsel for the defendants, as they will be referred to here, moved to suppress the evidence obtained

by the officers at the time of the arrests, on two grounds: 1. That the arresting officers did not have probable cause to believe that the defendants had committed a crime, or were committing a crime at the time they were arrested, and 2. That the arresting officers illegally entered the apartment thereby rendering the subsequent search unreasonable as well as illegal. This motion was denied by the trial judge.

The appeal is based solely on the denial of the motion to suppress the evidence. It is the theory of counsel that if the evidence is suppressed the case must fall. Counsel for the defendants, in his brief, poses three questions stated slightly different than the questions as framed in the motion to suppress. Issues cannot be raised on appeal that were not before the trial court. *Ladner v. United States*, 358 U.S. 169; *Tuberville, et al. v. United States*, 303 F.2d 411, C.A.D.C., cert. den. 370 U.S. 946; *United States v. Doelker*, 327 F.2d 343, C.A. 6; *Reeves v. Commissioner*, 314 F.2d 438, C.A. 6. Counsel briefs only his third question which presents the issue raised in the second question on the motion, the legality of the entry into the apartment of the defendant Luster. Counsel indicates that in discussing this one question he does not waive the right to discuss the other questions later. This Court cannot permit different questions on one appeal to be argued and briefed seriatim at different times.

We address ourselves to the questions presented to the trial court on the motion to suppress the evidence. There is virtually no dispute about the facts. On September 18, 1963, Federal Narcotics Agent Irvin received information from an informer, who had previously given him reliable information, that a man known as "Stinky" was in possession of heroin which the informer believed he could purchase. The informer was given money with which to make a purchase of heroin from "Stinky." Agent Irvin and fellow officers observed the informer enter an apartment building at 2208 John R. Street, in the City of Detroit, Michigan. (This was the building in which the apartment of defendant Luster was located.)

When the informer returned, he reported that "Stinky" would not sell him narcotics unless he used it on the premises in the presence of "Stinky." The informer also told Agent Irvin that a woman wearing a red dress came into the apartment while he was there and purchased four capsules of heroin which she injected into her arm in the presence of "Stinky." "Stinky's" girl friend (defendant Eula Lee Warner) assisted "Stinky" in making this sale. The informer saw "Stinky" put a medicine-type bottle containing approximately 100 red capsules of heroin in his bedroom. There was testimony that the officers saw a female with a red dress enter the apartment.

We agree with the trial judge that the facts as herein related constituted adequate information in the possession of the officers that the defendants had committed or were committing a crime at the time of the arrests. *Draper v. United States,* 358 U.S. 307.

Section 7607,[1] Title 26, U.S.C. authorizes agents of the Bureau of Narcotics to make arrests without a warrant for violations of any law of the United States relating to narcotic drugs, if the agents have reasonable grounds to believe that the person to be arrested has committed such a violation. The legality of arrests for federal offenses is to be determined by state law insofar as it is not violative of the Federal Constitution. *Ker v. California,* 374 U.S. 23; *Miller v. United States,* 357 U.S. 301; *Johnson v. United States,* 333 U.S. 10; *United States v. Di Re,* 332 U.S. 581.

The applicable Michigan statute is Section 28.880 M.S.A. and reads as follows:

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[1] Section 7607. "The Commissioner, . . . and agents, of the Bureau of Narcotics of the Department of the Treasury, . . . may—

". . .

"(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

> "To make an arrest, a private person, if the offense be a felony committed in his presence, or a peace officer with a warrant or in cases of felony when authorized without a warrant may break open and enter an outer door of any building in which the person to be arrested is or is reasonably believed to be, if, after he has announced his purpose, he is refused admittance."

At about 12:05 a.m., on the night of September 18th, after receiving the report of the informer, Agent Irvin and his fellow officers went to the apartment at 2208 John R. Street The informer opened the back door of the apartment building for them and directed them to apartment 25. The informer had given the officers accurate descriptions of "Stinky" and his girl friend by which they were enabled to identify the defendants.

Upon approaching the door of the apartment, the officers could hear a conversation going on inside and activity within the apartment. Detective Anderson knocked and all activity stopped inside. Agent Irvin then knocked, and identified the officers as Federal Narcotic Bureau agents, and requested the door to be opened. A muffled scream from a female voice was heard from the inside and when there was no indication from the inside that the occupants would either answer or open the door, the officers forcibly entered. Upon entering the apartment, the officers placed "Stinky" and his girl friend under arrest. They were identified as the defendants.

Agent Swank seized a small amount of heroin from a table in the room in which the defendants were arrested. Agent Swank then went into the bedroom and took from a bureau drawer a plastic medicine-type bottle containing 61 red capsules of heroin. This is the evidence which was the subject of the motion to suppress.

The basic contention on this appeal is that the entry was illegal because the officers did not declare their purpose to make an arrest.

From the muffled scream on the inside when Agent Irvin identified the officers as Federal Narcotic Bureau Agents, and the failure to open the door on request, it is obvious that the occupants knew the purpose of their visitors. In a

similar case we said: "It is a reasonable conclusion that a declaration of purpose was implicit in the declaration of identity." *United States v. Sharpe,* 322 F2d 117, 120. The circumstances called for quick action to prevent the destruction of the evidence which, as we have shown, the officers had probable cause to believe was concealed on the premises. 322 F2d at 120. We agree with the trial judge that, under the circumstances, the forcible entry of the officers into the apartment of the defendant Luster was reasonable.

Counsel for the defendants cites *Miller v. United States,* 357 U.S. 301, in support of his contention that the entry into the apartment was unlawful. In that case the Court held that the validity of the arrest was to be determined by reference to the law of the District of Columbia. That law was to be tested by criteria identical with those embodied in Section 3109,[2] Title 18, U.S.C. In the case before us, the validity of the arrest is to be determined by reference to the law of Michigan. Although the statute of Michigan requires a declaration of identity and purpose, as does the federal statute, the trial judge found that under the circumstances the forcible entrance was justified. We agree. In Miller the Court recognized that in some states exigent circumstances justify non-compliance with the strict requirements of the statute, for example, an attempt to destroy evidence. But the Court was not called on to decide and did not decide that question in Miller. 357 U.S. at 309.

The facts of Miller can be distinguished from the facts in the case at bar. In Miller the police knocked and in a low voice said "police." We do not know that the occupants heard the word "police." The petitioner opened the door

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[2] Section 3109. "Breaking doors or windows for entry or exit.

"The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

on an attached door chain and asked what the officers were doing there. Before either officer responded, the petitioner attempted to close the door and without declaring their purpose, the officers forced an entrance.[3] In the case at bar, it was obvious that the occupants knew the identity of the officers and made no attempt to open the door.

We conclude that the officers had reasonable ground and probable cause to believe that the defendants were in the apartment and that they were violating the laws of the United States with reference to narcotics. Having such belief, they were authorized to make arrests without warrants. The officers having identified themselves, and being recognized from within with no effort to open the door, were confronted with the requirement to take quick action to prevent the destruction of evidence. The forcible entry was therefore legal and the arrests of the defendants upon entering the apartment were legal. The evidence in question was found in a lawful search incidental to the arrests, and was admissible. *Draper v. United States,* 358 U.S. 307; *United States v. Rabinowitz,* 339 U.S. 56; *Harris v. United States,* 331 U.S. 145; *United States v. Wood,* ... F.2d ... C.A. 6.

The judgment of the District Court is affirmed.

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[3] In footnote 11 to his opinion, Justice Brennan said: ". . . Our examination of the record made at that time brings us into complete agreement with Judge Edgerton, who, dissenting in the Court of Appeals, said, 'I find no evidence, that supports an inference that Miller even recognized the officers as the narcotics squad.' 100 U.S.App. D.C. 302, 311, 244 F.2d 750, 759. Even if petitioner could have seen the officers sufficiently to make out their faces, there is no evidence that he knew them personally. . . ." 357 U.S. at 311.